

St. John's Law Review

Volume 13
Number 2 *Volume 13, April 1939, Number 2*

Article 15

May 2014

Labor Law--N.L.R.B.--Jurisdiction--Power to Issue Affirmative Orders (Consolidated Edison Company of New York v. N.L.R.B., 59 S. Ct. 206 (1938))

St. John's Law Review

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Recommended Citation

St. John's Law Review (1939) "Labor Law--N.L.R.B.--Jurisdiction--Power to Issue Affirmative Orders (Consolidated Edison Company of New York v. N.L.R.B., 59 S. Ct. 206 (1938))," *St. John's Law Review*. Vol. 13 : No. 2 , Article 15.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol13/iss2/15>

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where the cause of action arose within the state.¹³ "In the cases where the jurisdiction of the state court was sustained there were factors present which dictated the conclusion that orderly and effective administration of justice required the carrier to submit to suit in the State where the action was brought."¹⁴

While it is unquestionably true that repeated considerations of the problem have made the criterion to be applied in these cases "clearer",¹⁵ it is still true that, to a great extent, the facts of each case present a unique problem¹⁶—a problem that can be properly solved when the court keeps in mind the necessities of "orderly, effective administration of justice."¹⁷

L. J.

LABOR LAW—N. L. R. B.—JURISDICTION—POWER TO ISSUE AFFIRMATIVE ORDERS.—Defendants are public utilities engaged in the sale of electric energy. Although not directly engaged in interstate sales of electricity, they supply power to public utilities, transportation companies and departments of the Federal Government, all located within the state but engaged in interstate operations. Charges were filed with the N. L. R. B. by the United Electrical and Radio Workers of America, affiliated with the C. I. O., accusing defendants of interfering with the right of employees to form or join their own labor organizations, and of contributing to the A. F. of L.¹ Defen-

Harris v. American Ry. Express Co., 12 F. (2d) 487 (C. C. A. D. of C. 1926); Murnan v. Wabash Ry., 220 App. Div. 218, 221 N. Y. Supp. 332 (2d Dept. 1927); N. V. Brood en Beschuitfabrek v. Aluminum Co. of America, 136 Misc. 349, 239 N. Y. Supp. 702 (1930); Erving v. Chicago, N. W. Ry., 171 Minn. 87, 214 N. W. 12 (1927).

¹³ See Farrier, *loc. cit. supra* note 6, at 381, 389, 390.

¹⁴ Lehman, J., in Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 387, 199 N. E. 628 (1936).

See cases cited in notes 10, 11, 12, *supra*.

¹⁵ See Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 386, 199 N. E. 629 (1936); Jensen v. United Air Lines Transport Corp., 255 App. Div. 611, 613, 8 N. Y. S. (2d) 374 (1st Dept. 1938).

¹⁶ It is necessary to keep in mind that this discussion is based upon the assumption that the defendant corporation is within the jurisdiction of the court by due process, and the only question which is to be considered is whether such jurisdiction casts so heavy a burden on the carrier as to interfere unreasonably with interstate commerce.

¹⁷ See International Milling Co. v. Columbia Trans. Co., 292 U. S. 511, 54 Sup. Ct. 797 (1934); Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 199 N. E. 628 (1936).

¹⁸ 49 STAT. 452, 29 U. S. C. A. § 158 (Supp. 1935): "It shall be an unfair labor practice for an employer * * * (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

dants challenged the jurisdiction of the Board, contending its business was predominately *intrastate*. While these proceedings were progressing before the Board, an agreement was consummated between defendants and the A. F. of L. union concerning wages, hours, arbitration of disputes and recognition of that union as a collective bargaining agency. The Board held these contracts to have been executed under circumstances rendering them invalid and ordered that they be given no effect.² The circuit court of appeals affirmed the Board's holdings.³ Upon *certiorari* to the Supreme Court, *held*: (1) The Board had proper jurisdiction inasmuch as defendants' activities extended to instrumentalities engaged in foreign and interstate commerce and any industrial strife resulting from unfair labor practices by defendants would interfere with such commerce; (2) the Board had no power to invalidate the Brotherhood contracts. The section authorizing the Board to take affirmative action to effectuate the policies of the Act does not confer punitive jurisdiction for their violations.⁴ *Consolidated Edison Company of New York v. N. L. R. B.*, 59 Sup. Ct. 206 (1938).

The jurisdiction of the N. L. R. B. extends to unfair labor practices which *directly* affect *interstate* and foreign commerce.⁵ The fact that a utility is operating predominantly *intrastate* does not exclude the Federal Government from intervening when the *intrastate* activities have a definite and *direct* effect on *interstate* and foreign commerce.⁶ The application of this principle to the instant case is new inasmuch as there is an intervening agency between the source of the

² 4 N. L. R. B. 71 (1938).

³ 95 F. (2d) 390 (C. C. A. 2d, 1938).

⁴ 49 STAT. 453, 29 U. S. C. A. § 160(c) (Supp. 1935): "If upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay as will effectuate the policies of this Act * * *."

⁵ *Id.* § 160(a): "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice [listed in § 158 of this title] affecting foreign and interstate commerce"; *Foster Bros. Mfg. Co. v. N. L. R. B.*, 85 F. (2d) 984 (C. C. A. 4th, 1936) (the purpose of this Act is to prevent unfair labor practices in interstate commerce on the part of those engaged in such commerce); *N. L. R. B. v. Washington, V. & M. C. C. Co.*, 85 F. (2d) 990 (C. C. A. 4th, 1936); *Agwilines v. N. L. R. B.*, 87 F. (2d) 146 (C. C. A. 2d, 1937); *Myers v. Bethlehem Shipbuilding Corp.*, 88 F. (2d) 154 (C. C. A. 1st, 1937), *aff'd*, 15 F. Supp. 915 (D. C. Mass. 1936).

⁶ *Houston & Texas Ry. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833 (1914); *Wisconsin Railway Commission v. Chicago, B. & Q. Ry.*, 257 U. S. 563, 42 Sup. Ct. 232 (1922); *New York v. United States*, 257 U. S. 591, 42 Sup. Ct. 239 (1922); *Stafford v. Wallach*, 258 U. S. 495, 42 Sup. Ct. 397 (1922); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570 (1922); *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 43 Sup. Ct. 270 (1923); *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 Sup. Ct. 615 (1937).

difficulty and its effect on interstate commerce, namely, the purchasers of power from the defendant company. It might be argued that the presence of an intervening agency no longer makes it possible that the intrastate source of difficulties would be *directly* responsible for the interference with interstate commerce. It is apparent, however, that despite the presence of an intervening agency here, a strike in the defendant company would have a most direct and disastrous effect on interstate commerce.⁷ The case cannot be construed as standing for the proposition that an intervening agency will no longer prevent the Board from taking jurisdiction, where the source of the difficulty is intrastate but eventually affecting interstate commerce. The court found that the defendants' intrastate activities had a *direct* effect on interstate commerce and this still remains the criterion in these cases.⁸

Whatever authority the Board possesses in the matter of taking the affirmative action must be derived from Section 160(c) of the National Labor Relations Act.⁹ It is this section which permits the Board, after finding the employer guilty of unfair labor practices, "to take such affirmative action, as will effectuate the policies of this Act."¹⁰ How extensive this power to take affirmative action is depends on the individual facts of each case. In issuing affirmative orders to effectuate the purposes of the Act, the courts have ordered the disestablishment of company unions by employers where collective bargaining was not possible and the policies of the Act were thereby thwarted.¹¹ Whenever it appears that a union is under the domina-

⁷ The circuit court of appeals, upholding the jurisdiction of the Board in the instant case, attempted to show the detrimental effect which industrial strife in the petitioning companies would have on interstate commerce in these words: "Instantly the terminals and trains of three great interstate railroads would cease to operate; interstate communications by telephone, telegraph and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships whose docks are lighted and operated by electrical energy would be greatly impeded * * * such effects we cannot regard as indirect and remote." 95 F. (2d) 390 (C. C. A. 2d, 1938).

⁸ "Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement, *The Daniel Ball*, 10 Wall. 557, 564 (U. S. 1871), to adopt measures to promote its growth and insure its safety, *Mobile County v. Kimball*, 102 U. S. 691, 696, 697 (1820), to foster, protect, control and restrain, *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169 (1912). That power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it."

⁹ See note 4, *supra*.

¹⁰ 49 STAT. 449, 29 U. S. C. A. § 151 (Supp. 1935): "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

¹¹ *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 58 Sup. Ct. 571 (1938), *rev'd*, 91 F. (2d) 178 (C. C. A. 3d, 1937), (1938) 13

tion and control of the employer so as to make it impossible to function as a true collective bargaining agency for the employees, the Board may take affirmative action in the form of a disestablishment order or an order compelling its non-recognition by the employer. Thus, one criterion for disestablishment is whether or not the right to bargain collectively exists.¹²

Under the Act, the Board's findings of fact are conclusive and binding on the court if supported by evidence. However, subsequent constructions of the statute have held that the evidence must be substantial.¹³ In the instant case affirmative action could not be invoked so as to invalidate defendants' contracts with an independent labor organization. There was no substantial evidence sufficient to support the Board's finding that the contracts grew out of unfair labor tactics or that giving them effect would thwart the policy of the Act.¹⁴ On the contrary, the contract recognized the right of the Brotherhood to bargain collectively for its own members.¹⁵ It thus appears that a contract with a union which represents the free choice of employees is valid when the power to bargain collectively exists.¹⁶

The Supreme Court issued the above ruling although it found at the outset that (1) the Brotherhood was an indispensable party to the litigation; (2) the failure on the part of the Board to give them notice entitling them to a hearing rendered the Board without jurisdiction to invalidate the above contracts;¹⁷ and (3) the validity of the contracts

ST. JOHN'S L. REV. 178; N. L. R. B. v. Pacific Greyhound Lines, Inc., 302 U. S. 679, 58 Sup. Ct. 577 (1938), *rev'd*, 91 F. (2d) 458 (C. C. A. 9th, 1937).

¹² *In re Atlantic Woolen Mills*, 1 N. L. R. B. 376 (1936); *In re Wheeling Steel Corp.*, 1 N. L. R. B. 699 (1936); *In re Alaska Juneau Gold Mining Co.*, 2 N. L. R. B. 125 (1936); *In re Shell Oil Co. of California*, 2 N. L. R. B. 835 (1936); *In re Wallace Manufacturing Co.*, 2 N. L. R. B. 1081 (1937); *In re Cating Rope Works, Inc.*, 4 N. L. R. B. 125 (1938).

¹³ 49 STAT. 453, 29 U. S. C. A. § 160(c) (Supp. 1935): "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." The courts have interpreted the term "evidence" to mean "substantial evidence." N. L. R. B. v. Washington, V. & M. C. C. Co., 85 F. (2d) 990 (C. C. A. 4th, 1936), cited *supra* note 5; N. L. R. B. v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 58 Sup. Ct. 571 (1938), cited *supra* note 11; N. L. R. B. v. Wallace Manufacturing Co., 95 F. (2d) 818 (C. C. A. 4th, 1938); N. L. R. B. v. Thompson Products, 97 F. (2d) 13, 15 (C. C. A. 6th, 1938); see (1939) 13 ST. JOHN'S L. REV. 391.

¹⁴ The instant case at p. 220: "Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act * * *." Ballston-Stillwater Co. v. N. L. R. B., 98 F. (2d) 758, 760 (C. C. A. 2d, 1938); see note 10, *supra*.

¹⁵ 49 STAT. 452, 29 U. S. C. A. § 157 (1935): "Employees shall have the right to self organization, to form, join or assist labor organization, to bargain collectively through the representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

¹⁶ See note 12, *supra*.

¹⁷ 49 STAT. 453, 29 U. S. C. A. § 160(b) (1935). The court at this point ruled in effect that this section, which authorizes the Board to serve only the employer, has no application to a contract between an independent union and an

was not in issue since they were entered into while the proceedings were progressing before the Board, and the amended complaint failed to assail the contracts. The court, however, chose to proceed in its opinion, in a discussion of affirmative powers of the Board. Thus it is not entirely clear on what ground the court bases its decision. It may be said with some degree of certainty, however, that the holding would have been the same way, had the court found proper notice *was* given to the Brotherhood and that the validity of the contracts *was* in issue.

P. M. L.

LABOR LAW—REVIEW OF FINDINGS OF N. L. R. B.—UNFAIR LABOR PRACTICES—EMPLOYER'S RIGHT TO HIRE AND FIRE—FREEDOM OF SPEECH.—Respondent, a bus company, had a one-year open shop contract with the union. During this time, officials of respondent made anti-union statements.¹ After its expiration and during negotiations prior to a second agreement, two employees were discharged. The N. L. R. B. found they were discharged for their union activity, while respondent contended that the true reason was their repeated and flagrant violations of proper rules and regulations. The Board found respondent guilty of numerous other unfair labor practices.² On petition by N. L. R. B. to enforce a "cease and desist order" and an order of reinstatement, *held*, petition denied.³ (1) The

employer but only to those instances when an employer has created and dominated a company union. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 58 Sup. Ct. 571 (1938), cited *supra* note 11.

¹ One official informed employees that the union had nothing to do with the act of the company in raising wages above those agreed upon in the contract, adding that employees did not have to join union or "pay tribute" to safeguard their rights. Another said that if he had a son he would not let him join the union.

² See *infra* note 4. THE NATIONAL LABOR RELATIONS ACT, 49 STAT. 452, 29 U. S. C. A. § 158 (Supp. 1935), provides: "It shall be an unfair labor practice for an employer:

"1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title (*i.e.*, the right to self-organization and collective bargaining).

"3. By discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization * * *.

"5. To refuse to bargain collectively with the representatives of the employees * * *."

³ Order of Board that company cease anti-union acts of certain superintendents upheld, even though respondent disclaimed all knowledge of, or responsibility for them. *N. L. R. B. v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4th, 1938); *cf. Peninsular & Occidental S. S. Co. v. N. L. R. B.*, 98 F. (2d) 411 (C. C. A. 5th, 1938); *Ballston-Stillwater K. Co. v. N. L. R. B.*, 98 F. (2d) 758 (C. C. A. 2d, 1938).